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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 375

SAFEWAY TRAILS, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE BALTIMORE AND ANNAPOLIS RAILROAD COMPANY, *Appellees*.

On Appeal From the United States District Court for the District of Columbia

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

Appellant (Safeway Trails), plaintiff below, appeals from the judgment of the specially constituted three-judge United States District Court for the District of Columbia, dated June 20, 1959 and entered June 30, 1959, dismissing the complaint of Safeway Trails and entering judgment for the United States of America (United States) and the Interstate Commerce Commission (I. C. C.), defendants below, and for The

Baltimore and Annapolis Railroad Company (Railroad); defendant-intervenor below. Safeway Trails submits this statement in compliance with Rules 13 and 15 of the Revised Rules of the Supreme Court of the United States to show the basis upon which this Court has jurisdiction on direct appeal to review the judgment of the District Court and that the questions presented are substantial.

OPINIONS BELOW

The opinion of the three-judge District Court for the District of Columbia is not yet reported and is annexed hereto as Appendix A. The opinion of division 1 of the I. C. C. is reported at 76 M. C. C. 727;[1] the subsequent opinion of the entire I. C. C. entered upon reconsideration[1] is reported at 79 M. C. C. 123; both opinions are annexed hereto as Appendices B and C respectively. The recommended report of Joint Board No. 120 to the I. C. C., as adopted by division 1, is not reported and is annexed hereto as Appendix D.

BASIS OF JURISDICTION

(i) This suit was initiated in the aforesaid District Court by Safeway Trails pursuant to 28 U.S.C. §§ 1336, 1398, 2284, 2321-2325 to annul and set aside a report and order of the I. C. C. and to enjoin permanently the I. C. C. from issuing thereunder a certificate of public convenience and necessity permitting, *inter alia*, the operation by the Railroad of a common carrier service by motor vehicle in interstate and foreign commerce between Fort George G. Meade, Maryland, and the City of Washington, District of Columbia.

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[1] *The Baltimore and Annapolis Railroad Company Extension — Washington, D. C.*, I.C.C. Docket No. MC-102299 (Sub-No. 7).

(ii) The final judgment of the District Court here sought to be reviewed is dated June 20, 1959 and was entered June 30, 1959. From this final judgment no rehearing was sought. Thereafter, notice of appeal was filed on July 7, 1959, in the United States District Court for the District of Columbia.

(iii) Jurisdiction to review on appeal the final judgment of the District Court is conferred upon this Court by 28 U.S.C. §§ 1253 and 2101(b).

(iv) There are many decisions which sustain the jurisdiction of the Supreme Court to review on direct appeal the judgment of the specially constituted three-judge District Court in this case. Two recent decisions are: *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957); *American Trucking Assos.* v. *United States*, 355 U.S. 141 (1957).

QUESTIONS PRESENTED

1. Whether the District Court correctly construed and applied Section 216(a) and (e) of the Interstate Commerce Act, Part II [49 U.S.C. § 316(a) and (e)], by sustaining the Interstate Commerce Commission for its failure to act upon the through-route proposal of Safeway Trails.

2. Whether the District Court was justified in sustaining the Interstate Commerce Commission for its failure to consider the detrimental effect upon existing motor bus carriers operating in the Washington area by the introduction into the area of additional competition to their charter and special bus operations from The Baltimore and Annapolis Railroad Company, upon the ground that the special and charter rights of Section 208(c) of the Act [49 U.S.C. § 308(c)] are not

severable from a certificate issued under Section 207(a) of the Act [49 U.S.C. § 307(a)] and flow without additional proof of public convenience and necessity.

3. Whether the District Court in sustaining the basic findings of the Interstate Commerce Commission as to the inadequacy of existing service between Washington, D. C. on the one hand and the District Training School and Fort George G. Meade on the other correctly construed and applied the substantial evidence rule as approved in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951) and subsequent pronouncements of the Supreme Court.

STATUTES INVOLVED

The relevant portions of the Interstate Commerce Act involved provide:

Section 208(a)

". . . and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, . . ." 49 U.S.C. § 308(a)

Section 216(a)

"It shall be the duty of every common carrier of passengers by motor vehicle to establish reasonable through routes with other such common carriers and to provide safe and adequate service, equipment, and facilities for the transportation of passengers in interstate or foreign commerce: . . ." 49 U.S.C. § 316(a)

Section 216(e)

". . . and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, . . ." 49 U.S.C. § 316(e)

STATEMENT OF THE CASE

Safeway Trails is a common carrier of passengers by motor vehicle subject to the provisions of Part II of the Interstate Commerce Act, 49 U.S.C. § 301 et seq., and operates in regular route service generally between the District of Columbia and points as far north as New York City. As part of its scheduled regular route operations, Safeway Trails provides express service between the District of Columbia and the military reservation of Fort George G. Meade, Md., the National Security Agency located within the Fort Meade military reservation, and the District Training School located immediately at the entrance to the Fort Meade reservation. As an adjunct to its regular route operations, Safeway Trails actively is engaged in transporting special and chartered bus parties originating particularly within the District of Columbia.

In addition to providing service to the public over its own lines, Safeway Trails, a member of the National Trailways Bus System, an association of independent bus operators, offers through-route service to almost every part of the country by tacking its certificated authority onto the authority of connecting passenger motor carriers; through-route service is provided in accordance with some 22 agreements with a like num-

ber of bus companies some of which are affiliated with the Trailways association and some of which are not.

The Railroad operates a freight rail line to and from a junction with the Baltimore and Ohio Railroad near Baltimore City and Annapolis, Md. serving intermediate points including Glen Burnie, Md. While it transports no passengers by rail, it does, nevertheless, offer passenger transportation by motor vehicle over several routes duly certificated by the I. C. C. within an area circumscribed generally by Baltimore City to the north, Annapolis to the southeast and Fort Meade to the southwest. Included within the area is the Village of Glen Burnie.

By an application[2] filed pursuant to Section 207(a) of the Interstate Commerce Act, Part II, 49 U.S.C. § 307(a), the Railroad sought to extend its passenger bus operations from Glen Burnie, Md. into the District of Columbia utilizing its existing authority from Glen Burnie to a point immediately north of Fort Meade which, by its application, it sought to extend into Fort Meade and, thence, into the District of Columbia via a route identical to that over which Safeway Trails operates its own Washington-Fort Meade service.

Specifically, the Railroad sought a certificate of public convenience and necessity which would: (1) permit a more direct highway routing than it then held from Glen Burnie into Fort Meade; (2) permit operation over a segment of the Baltimore-Washington Parkway near the National Security Agency installation (NSA) which would provide a more direct route between NSA and the District of Columbia than would

[2] Ibid., p. 2, footnote 1.

be possible by operating through Fort Meade proper; and (3) permit operations through Fort Meade and into the District of Columbia over U. S. Highway No. 1. (1) and (2) principally were sought for the operating convenience of the Railroad, while (3) contained the real substance of the Railroad's application the granting of which would permit the Railroad to operate in direct competition with Safeway Trails between Fort Meade and Washington over a route which at best produces only meager revenues and results frequently in a deficit. In addition, the Railroad made clear its intention to compete with Safeway Trails and other Washington based carriers for special and charter operations originating within the District of Columbia.

Accordingly, Safeway Trails appeared before the I. C. C. to oppose the granting of the Railroad's application. This opposition was in the alternative: (1) public convenience and necessity do not require direct bus service to and from Glen Burnie and the District of Columbia and the entire application should be denied; (2) but if such direct bus service is required, it should be accomplished by tacking the existing Fort Meade-Washington, D. C. authority of Safeway Trails to that of the Railroad via a through-route operation and not by granting to the Railroad authority duplicating that already held by Safeway Trails; (3) that, in any event, the service of Safeway Trails between the District of Columbia and Fort Meade, including NSA and the District Training School, is more than adequate to meet the demands placed upon it which neither require nor economically permit additional service; and, finally, (4) that the introduction of additional special and charter bus competition in the District of Columbia not only is unwarranted but would be detrimental to existing carriers.

Upon the record the I. C. C. found, *inter alia*, (1) that public convenience and necessity require service to and from Glen Burnie and the District of Columbia; (2) that the Railroad refused to join in a through-route operation with Safeway Trails; (3) that the Railroad offered no evidence of need for additional service to NSA and that the existing service of Safeway Trails to that installation is adequate, but that the existing service between Washington, D. C. and Glen Burnie, including that to the District Training School, is patently inadequate; (4) that special and charter rights flow automatically from a grant of a certificate of public convenience and necessity covering a regular route operation, and, therefore, the evidence of record relating to the detriment to existing carriers by additional inroads upon their special and charter operations is immaterial.

Thereafter, upon reconsideration, the I. C. C. by a six to five majority, directed that there issue to the Railroad a certificate of public convenience and necessity permitting the Railroad [(1) supra] to operate a more direct route from Glen Burnie into Fort Meade and [(3) supra] to operate from Fort Meade to and from the District of Columbia. The Railroad was denied authority [(2) supra] to operate over the segment of the Baltimore-Washington Parkway on the ground that the Railroad offered no evidence with respect to its proposed service to NSA.

Thereafter, this suit was brought before a three-judge United States District Court for the District of Columbia. An interlocutory injunction was issued, but upon final submission judgment was entered for defendants following which this appeal was noted.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. The Question on Through-Routes

In and of itself Safeway Trails is a small bus company operating within a limited area along the east coast described by New York City to the north and Washington, D. C. to the south. Within this area it competes with a number of common carriers and particularly with the giant Greyhound Corporation having a continental network of bus routes and seemingly unlimited financial resources. It might be curious that Safeway Trails in this atmosphere is able to survive; it is probably remarkable that it not only survives but enjoys relative prosperity, and today offers to the public the finest of equipment and service not only over its own routes, but through connecting carriers to all parts of the country.

The key to its continued existence and ability to avoid ingestion by its more powerful competitors, including the railroads, is found in Section 216(a) of the Interstate Commerce Act, Part II, 49 U.S.C. § 316(a), which states in the most unambiguous of terms that "... *It shall be the duty of every common carrier of passengers by motor vehicle to establish reasonable through-routes with other such common carriers ...*"

In view of the express statutory language employed by the Congress in drafting Section 216(a) it may not be said that the establishment of through-routes between interstate passenger bus operators altogether is a matter of voluntary undertaking in every instance. Indeed, the language of the statute, when cast against the mandate of the declared National Transportation Policy[3] laid down by the Congress to control the deter-

[3] 54 Stat. 899 (1940); 49 U.S.C.A. prefatory note to § 301, Part II of the Interstate Commerce Act.

minations of the I. C. C., *Interstate Commerce Commission et al.* v. *Parker et al.*, 326 U.S. 60 (1945), serves only to emphasize the purpose of the Congress in enacting this legislation.

To the proposal of the Railroad to operate between Glen Burnie, Md. and Washington, D. C., Safeway Trails offered to join with the Railroad in the creation of a through-route utilizing the certificated authority of the Railroad for operations between Glen Burnie, Md. and Fort Meade, and, thence, via the certificated authority of Safeway Trails into the District of Columbia. The service would be offered to the public without change of bus, and from an operational point of view the service would be identical to that which the Railroad proposed for its sole operation.

The I. C. C. conceived itself to be without jurisdiction to consider the reasonableness of this through-route proposal when raised in a Section 207(a)[4] proceeding and, therefore, largely ignored the proposal of Safeway Trails with the observation made first by the Joint Board:

> "As of the day of the continued hearing, the offer had not been accepted by applicant (Railroad)." (Appendix D, p. 30a)

Next, upon exceptions to the recommended report of the Joint Board, by division 1:

> "There is no evidence to show that this proposal is acceptable to applicant." (Appendix B, p. 11a)

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[4] Section 207(a) Part II of the Interstate Commerce Act, 49 Stat. 551 (1935), 49 U.S.C. § 307(a).

And, finally, upon reconsideration, by a majority of one of the entire Commission, five Commissioners dissenting:

> "This proposal is not acceptable to applicant." (Appendix C, p. 18a)

Safeway Trails, of course, was motivated by a desire to promote safe, adequate, economical and efficient service through the economical and efficient utilization of existing operating certificates, equipment, facilities and personnel. On the other hand, the proposal of the Railroad to duplicate the operation of Safeway Trails is shown by the record, unrefuted by the Railroad, to be calculated not to stimulate new passenger traffic but only to detract from the existing service of Safeway Trails. All of these things and more the I. C. C. could have considered except for its extremely narrow construction of the scope of public convenience and necessity and its implied rejection of the express mandate of Section 216(a) of the Act, 49 U.S.C. § 316(a).

In this era of massive interstate highway construction, declining rail passenger services and stifling passenger motor carrier competition, the agency created by the Congress to regulate the national transportation industry ought not to be permitted, by its own timidity, to shrink from its delegated obligation. As can be demonstrated on brief and argument, the I. C. C. enjoys ample and sufficient jurisdiction over the industry to compel the institution of through-route service in a manner as may be required by public convenience and necessity in a Section 207(a) application proceeding. The refusal of the Commission to consider the obligation of the Railroad to utilize the offer of through routing as an alternative to destructive dupli-

cation of service was legal error beyond the limitations of administrative discretion. The I. C. C. was required by the evidence before it to deny the application or to grant it in part and upon condition of acceptance of Safeway's offer. The opinion of the District Court does little to clarify or settle this problem, which problem because of its importance to the passenger motor carrier industry deserves plenary consideration by this Court.

B. The Question on Special and Charter Bus Operations

Because of the great tourist popularity enjoyed by Washington, D. C., special and charter bus operations originating within the District of Columbia have grown to a valued source of revenue to those bus companies operating out of the Washington area. Indeed, several of these companies are able financially to continue their regular route operations only because of the revenue derived from special and charter operations. The scant likelihood that the Railroad's proposed Glen Burnie-Washington operation will be economically self-sustaining has forced most Washington based bus operators, including Safeway Trails, to conclude the Railroad to be motivated in its desire to operate into Washington, D. C. solely for the purpose of participating in the special and charter revenue the unrestricted grant of its Section 207(a) application would permit. The Railroad concedes that it will compete actively for the existing special and charter business. The I. C. C., again without going into the merits of the evidence and arguments made thereon, expressly concluded itself to be without jurisdiction to limit or otherwise condition a certificate of public convenience and necessity

issued under Section 207(a), Part II of the Act, so as to restrict the Railroad from competing for special and charter business within Washington, D. C. On this ground the I. C. C., on its own motion, rejected as immaterial all evidence relating to the injury to be visited upon existing carriers and their service to the public by inroads thereon anticipated from the Railroad.

The District Court endorsed this interpretation notwithstanding the provisions of Section 208(a) of the Act, 49 U.S.C. § 308(a), which provides in part:

> ". . . and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require . . ."

Both the I.C.C. and the District Court ignored the further argument of Safeway Trails that despite the express provision of Section 208(a), supra, if it were correct that the Congress delegated to the I.C.C. no authority to condition or limit a certificate so as to prevent undue and destructive competition for special and charter business, the Commission must consider evidence of the consequences of the grant upon public convenience and necessity and within the framework of the National Transportation Policy. Cf. *Central Kentucky Bus Lines, Inc., Common Carrier Application*, 61 M.C.C. 581, 585.

With the constantly mounting costs of regular route operations Safeway Trails, together with almost all other passenger motor carriers, looks increasingly toward its special and charter revenues as a means of alleviating deficits produced on some of its less patron-

ized runs. Today approximately 20 per cent of the revenues of Safeway Trails are attributable to its special and charter operations most of which originate within Washington, D. C.

The assumed absence of power of the I.C.C. to limit and restrict special and charter operations performed under a certificate of public convenience and necessity by virtue of Section 208(c) of Part II of the Act, 49 U.S.C. § 308(c), is a problem which has plagued the industry for many years and on which it and the Commission have sought legislative relief. This Court should consider the obligation of the Commission to apply its discretion to the refusal of a certificate if the incidental rights are shown to be destructive.

C. The Sufficiency of the Findings and the Evidence

The I.C.C. specifically found the existing service between Washington, D. C. and the District Training School to be inadequate. The District Court found this finding to be "... based on ample evidence." In so finding, however, the District Court failed to apply the substantial evidence rule as recognized by this Court in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951), in accordance with Section 10(e) of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009(e), as requiring of the reviewing court a consideration of the whole of the record made before the agency the action of which is the subject of review.

It is quite apparent not only that the I.C.C. failed to consider the evidence of Safeway Trails relating to service between the District Training School and Wash-

ington, D. C., but that the District Court committed the same failure.

The record made before the Joint Board shows that at the first hearing on the Railroad's application, several employees of the District Training School were produced and testified of a need for service between the School's grounds and Washington, D. C. At that time no service operated directly onto the School's grounds, although Safeway Trails did operate past the front entrance to the School and, as the record further shows, had been unsuccessful in its attempt to ascertain from the School authorities the extent of the transportation needs of the School. By their testimony these employees were quite specific as to their need for regular service for three eight-hour work shifts. Accordingly, Safeway Trails instituted service to the School specifically in accordance with the stated need. And at the time of the second and final hearing before the I.C.C., one month later, Safeway Trails was able to demonstrate that any need for service to the School was being fully satisfied by an existing carrier which was ready, willing and able to perform the service under an existing certificate.

Had the District Court considered the service of Safeway Trails against the need for transportation as stated by the Railroad's witnesses, the finding of the I.C.C. as to the inadequacy of the service to the School would have fallen for want of substantial supporting evidence.

As may be demonstrated on brief, the I.C.C. in a Section 207(a) application proceeding, consistently has considered not only the adequacy of existing service, but also the willingness of existing certificated carriers

to increase their service to meet an increase of public need. Only when existing carriers fail or refuse to meet an increased public need will the I.C.C. grant the application of another carrier seeking to provide additional service. The I.C.C. in the instant case has departed from this standard to the detriment of Safeway Trails.

The I.C.C. likewise has authorized the Railroad to operate in direct competition with the existing service of Safeway Trails between Fort Meade and Washington, D. C., although in this instance it failed to make a finding as to the adequacy or inadequacy of the existing service. Had such a finding been made, clearly it would have been without support in the record, for the Railroad offered no evidence relating to or indicating a need for additional service. Indeed, if a need for additional service had been shown, then Safeway Trails would have been quick to increase the quantum of its existing service to fill this need. The grant to the Railroad of authority from Fort Meade was merely an adjunct to its proposed service from Glen Burnie, and the Railroad did not seek to establish a need for additional Fort Meade service. Accordingly, the I.C.C. should have restricted the Railroad against carrying passengers from Fort Meade to Washington. Certainly such a restriction is appropriate when it is realized, as the record demonstrates, that the route in question hardly is sufficient to support one carrier and much less sufficient to support two.

By its arbitrary grant, the I.C.C. has placed Safeway Trails and the Railroad in ruinous competition of the very nature and character which the Interstate Commerce Act expressly was enacted to avoid. Had the I.C.C. and, subsequently, the District Court reflected

this grant against the National Transportation Policy, the application of the Railroad would have been rejected, either by the Commission in the first instance, or upon remand from the District Court.

CONCLUSION

The questions presented by this appeal, particularly those relating to the I.C.C.'s exercise of its control over the institution of through-routes and limitations on charter rights, are substantial and of importance not only to the parties herein but also the industry as a whole. These are questions of first impression for this Court, and, indeed, were so for the District Court. Because of the principles involved and because of the effect of the decision below on Safeway Trails and the unfortunate precedent set by it upon the motor carrier industry, we respectfully ask that probable jurisdiction be noted.

Respectfully submitted,

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